

**IOWA DEPARTMENT OF NATURAL RESOURCES  
ADMINISTRATIVE CONSENT ORDER**

IN THE MATTER OF:

**SCHMITT DAIRY, INC.**  
Winneshiek, County

ADMINISTRATIVE CONSENT  
ORDER  
NO. 2010-AFO-29

TO: Mark Schmitt, Registered Agent  
Schmitt Dairy, Inc.  
1237 County Road W-14  
Fort Atkinson, Iowa 52144

**I. SUMMARY**

This administrative consent order is entered into between Schmitt Dairy, Inc. (Schmitt Dairy) and the Iowa Department of Natural Resources (DNR) for the purpose of resolving the issues surrounding animal feeding operation violations at Schmitt Dairy located at 1237 County Road W-14, Fort Atkinson, Iowa. In the interest of avoiding litigation, the parties have agreed to the provisions below.

Questions regarding this administrative consent order should be directed to:

**Relating to technical requirements:**

Tom McCarthy, DNR Field Office #1  
Iowa Department of Natural Resources  
909 West Main, Suite 4  
Manchester, Iowa 52057  
Phone: 563/927-2640

**Relating to legal requirements:**

Kelli Book, Attorney for the DNR  
Iowa Department of Natural Resources  
7900 Hickman Road, Suite 1  
Windsor Heights, Iowa 50324  
Phone: 515/281-8563

**Payment of penalty to:**

Director, Iowa DNR  
Wallace State Office Building  
502 East Ninth Street  
Des Moines, Iowa 50319-0034

**II. JURISDICTION**

This administrative consent order is issued pursuant to Iowa Code section 455B.175(1) which authorizes the Director to issue any order necessary to secure compliance with or prevent a violation of Iowa Code Chapter 455B, Division III, Part 1 or Iowa Code Chapter 459, Subchapter III, and the rules adopted or permits issued pursuant thereto, and Iowa Code section 455B.109 and 567 Iowa Administrative

IOWA DEPARTMENT OF NATURAL RESOURCES  
ADMINISTRATIVE CONSENT ORDER  
ISSUED TO: SCHMITT DAIRY, INC.

Code (IAC) chapter 10, which authorize the Director to assess administrative penalties.

**III. STATEMENT OF FACTS**

1. Schmitt Dairy is located at 1237 County Road W-14, Fort Atkinson, Iowa (Section 20, Washington Township, Winneshiek County). The facility has a free stall dairy barn that was constructed in 1994 and a dry cow confinement building that was constructed in 2000. Manure storage is a below ground concrete pit located east of the free stall dairy barn. The facility has stated that its animal capacity consists of 550 mature cows (770 animal units) and 50 immature cows (50 animal units, for a total animal unit capacity of 820. The facility also has open feedlots with approximately 200 cows, which were constructed in 1977, 1981, and 1997.

2. On January 8, 2010, DNR Field Office 1 received a complaint regarding the application of liquid manure on snow covered ground. The complainant stated that Mark Schmitt had over 500 cows in a free stall dairy barn at a dairy in Washington Township in Winneshiek County. DNR Field Office 1 reviewed its records and had no record of Schmitt Dairy. DNR Field Office 1 contacted Hackman Dairy, a nearby dairy to the location that the complainant had mentioned. The personnel at Hackman Dairy stated that no manure application had taken place at the Hackman Dairy facility. The personnel stated that Mark Schmitt was not part of Hackman Dairy, but that Schmitt Dairy was located one mile north of Hackman Dairy.

3. On January 11, 2010, Tom McCarthy, DNR Field Office 1 environmental specialist senior, investigated the manure application complaint. Mr. McCarthy observed that liquid manure had been applied to a field located southeast of Schmitt Dairy and south of 123<sup>rd</sup> Street. The snow cover on the field was several inches deep. Mr. McCarthy then went to the Schmitt Dairy facility and spoke with Mark Schmitt. Mr. Schmitt stated that the manure had been applied on Monday, January 4, 2010. He stated that approximately 7,000 to 10,000 gallons of liquid manure per acre was applied to the field. Mr. Schmitt stated the facility's manure pit only held 400,000 gallons of manure. When Mr. McCarthy asked Mr. Schmitt about the capacity of the buildings at the facility, Mr. Schmitt stated he knew he was over the State of Iowa's manure management plan (MMP) requirements since he had more than 500 animal units (357 mature cows) on-site. Mr. McCarthy provided Mr. Schmitt with a copy of the MMP requirements. Mr. McCarthy also discussed the winter manure application law. Mr. Schmitt stated he was not a certified manure applicator. He stated that he had studied the winter manure application law and realized it would require him to construct a large manure storage structure. He stated the structure would cost \$750,000 and that because of the karst topography in the area he would not be able to construct the structure at the facility. He stated that the existing facility was too old to justify the expense.

IOWA DEPARTMENT OF NATURAL RESOURCES  
ADMINISTRATIVE CONSENT ORDER  
ISSUED TO: SCHMITT DAIRY, INC.

4. On January 14, 2010, Mr. Schmitt contacted Mr. McCarthy and stated that liquid manure from the facility would be surfaced applied to a field in the northwest ¼ of Section 28, Washington Township on January 19, 2010. Mr. Schmitt also informed Mr. McCarthy that the facility was working with Pinnacle Group to develop a MMP.

5. On January 19, 2010, DNR Field Office 1 received a complaint regarding the application of manure by Schmitt Dairy on January 18, 2010. Mr. McCarthy contacted Mr. Schmitt, who stated the manure application had occurred a day earlier than planned. He stated that he and his employees were in the process of becoming certified manure applicators.

6. On January 21, 2010, DNR Field Office 1 issued a Notice of Violation letter to Schmitt Dairy for the violations discovered during Mr. McCarthy's inspection.

7. On February 24, 2010, DNR Field Office 1 received the MMP with Phosphorus Index, the indemnity fee, and the filing fee from Schmitt Dairy. On March 10, 2010, DNR Field Office 1 reviewed and approved the MMP for the facility.

#### **IV. CONCLUSIONS OF LAW**

1. Iowa Code section 459.103 provides that the Environmental Protection Commission (Commission) shall adopt rules related to the construction or operation of animal feeding operations, including permit and minimum manure control requirements. The Commission has adopted such rules at 567 IAC chapter 65.

2. Iowa Code section 459.312(1)"a"(1) and 567 IAC 65.16(1)"b" require that the owner of a confinement feeding operation constructed or expanded after May 31, 1985, other than a small feeding operation, shall submit a MMP to the DNR. Iowa Code section 459.102(47) defines a "small animal feeding operation" as an operation with an animal unit capacity of five hundred or fewer animal units. This requirement became effective May 12, 1999. The free stall building at Schmitt Dairy was constructed in 1994 and the dry cow confinement building was constructed in 2000. The facility has an animal unit capacity of 820 animal units. Schmitt Dairy failed to submit a MMP in 1999 when it became a requirement and operated the facility until March 10, 2010 without a MMP. Schmitt Dairy operated without a MMP for over ten years. The above facts indicate a violation of this provision.

3. 567 IAC 65.17(1)"d" requires that a person who submitted an original MMP prior to April 2, 2002, shall submit a phosphorus index with the first MMP update on or after August 25, 2008. Since Schmitt Dairy's original MMP should have been submitted in 1999, the first phosphorus index should have already been submitted. The above facts indicate a violation of this provision.

IOWA DEPARTMENT OF NATURAL RESOURCES  
ADMINISTRATIVE CONSENT ORDER  
ISSUED TO: SCHMITT DAIRY, INC.

4. Iowa Code section 459.503 and 567 IAC 65.16(6) require all persons required to submit a MMP to also submit an indemnity fee. The indemnity fee is ten cents per animal unit. Schmitt Dairy's indemnity fee is \$82.00. The indemnity fee was due when the MMP should have been filed and Schmitt Dairy delayed payment of this fee for over ten years.

5. 567 IAC 65.16(3) requires that all persons required to submit a MMP also submit an updated MMP and compliance fees on an annual basis. This requirement became effective March 1, 2003. The compliance fee is fifteen cents per animal unit. Schmitt Dairy should have filed at least seven updated MMPs and fees. Schmitt Dairy's annual compliance fee is \$123.00.

6. 567 IAC 65.16(7) requires any person submitting an original MMP to also pay to the DNR a MMP filing fee of \$250.00. The filing fee is required to be submitted with the MMP and Schmitt Dairy delayed payment of this fee for over ten years.

7. Iowa Code section 459.315(2) and 567 IAC 65.19(1) states that a commercial manure service, a commercial manure service representative or a confinement site manure applicator shall not apply dry or liquid manure to land, unless the person is certified. During Mr. McCarthy's investigation, it was determined that Mr. Schmitt and the Schmitt Dairy employees had applied manure from the facility since January 1, 2004 without confinement site manure applicator certification. The above-mentioned facts indicate violations of this provision.

8. Iowa Code section 459.313A (1) states that during the period beginning December 21 and ending April 1, a person may apply liquid manure originating from a manure storage structure, that is part of a confinement feeding operation, on snow covered ground only when there is an emergency. Section 459.313A further requires that the person must contact the DNR prior to the manure application. Schmitt Dairy applied liquid manure on snow covered ground on January 4, 2010 and failed to contact DNR Field Office 1 prior to the application. The above-mentioned facts indicate a violation of this provision.

**V. ORDER**

THEREFORE, the DNR orders and Schmitt Dairy agrees to do the following:

1. Schmitt Dairy shall pay past annual compliance fees for the following years 2009, 2008, 2007, 2006, 2005, 2004, and 2003, for a total of \$861.00. The past compliance fees shall be submitted within 30 days of the date the Director signs this administrative consent order;
2. Schmitt Dairy shall notify DNR Field Office 1 prior to winter manure application;

IOWA DEPARTMENT OF NATURAL RESOURCES  
ADMINISTRATIVE CONSENT ORDER  
ISSUED TO: SCHMITT DAIRY, INC.

3. All employees and those transporting or handling manure from Schmitt Dairy shall be properly certified at all times when transporting or handling manure;
4. Schmitt Dairy shall submit map(s) to DNR Field Office 1 within 30 days of the date the Director signs this administrative consent order. The map(s) shall show the following: a) date of construction of all feedlots owned by Schmitt Dairy within 2,500 feet of the main dairy; b) separation distances from the dairy to residences, waterways, and wells that are owned and operated by Schmitt Dairy; and c) total number of open and confinement animals owned by Schmitt Dairy within 2,500 feet of the main dairy; and
5. Schmitt Dairy shall pay a penalty of \$8,000.00 within 30 days of the date the Director signs this administrative consent order.

**VI. PENALTY**

1. Iowa Code sections 459.603 and 455B.191 authorize the assessment of civil penalties of up to \$5,000.00 per day of violation for each of the water quality violations involved in this matter.

2. Iowa Code section 455B.109 authorizes the Commission to establish by rule a schedule of civil penalties up to \$8,000.00, which may be assessed administratively. The Commission has adopted this schedule with procedures and criteria for assessment of penalties in 567 IAC chapter 10. Pursuant to these rules, the DNR has determined that the most effective and efficient means of addressing the above-cited violations is the issuance of an administrative consent order with an administrative penalty of \$8,000.00. The administrative penalty is determined as follows:

Economic Benefit – The failure of Schmitt Dairy to comply with the animal feeding operation regulations has allowed the facility to achieve an economic benefit. Schmitt Dairy has achieved an economic benefit by delaying the payment of the compliance fees, filing fee, indemnity fee and preparation costs for the MMP and the Iowa Phosphorus Index. Schmitt Dairy should have filed eight annual updates, \$984.00 in annual compliance fees. These payments have been delayed and Schmitt Dairy has been able to achieve an economic benefit from delaying the payment of the fees. Schmitt Dairy was able to delay preparation costs for the MMP as well as delaying paying the indemnity fee of \$82.00 since 1999. Schmitt Dairy has also been able to avoid the cost of MMP recordkeeping and possible operating restrictions since 1999. Schmitt Dairy gained an economic benefit over producers who have timely filed MMPs. In addition to the economic benefit gained from delaying the filing of the MMP for over 10 years, Schmitt Dairy has gained an economic benefit by not having certified manure applicators. The applicators should have had certifications every year since 1999. Schmitt Dairy has saved education costs and certification fees for over 10 years. Additionally, Schmitt Dairy gained an economic

IOWA DEPARTMENT OF NATURAL RESOURCES  
ADMINISTRATIVE CONSENT ORDER  
ISSUED TO: SCHMITT DAIRY, INC.

advantage by applying liquid manure to snow covered ground. The facility failed to ensure sufficient storage for the winter months and Mr. Schmitt admitted the additional storage would be a large expenditure for the facility. The economic benefit received by Schmitt Dairy is estimated to be at least \$9,500.00. However, based on the gravity and culpability of these violations and the DNR's decision to handle the violations administratively, only \$2,500.00 is being assessed for this factor.

Gravity – One of the factors to be considered in determining the gravity of a violation is the amount of penalty authorized by the Iowa Code for that type of violation. As indicated above, substantial civil penalties are authorized by statute. Despite the high penalties authorized, the DNR has decided to handle the violations administratively at this time, as the most equitable and efficient means of resolving the matter. Schmitt Dairy's failure to obtain a MMP threatens the integrity of the animal feeding operation program. The MMP is a crucial aspect of the DNR's animal feeding operation program. The MMP ensures that an animal feeding operation has adequate production land available so that the manure can be properly applied to crop land at an agronomic rate in order to prevent over application of manure. Schmitt Dairy is a large operation to be operating without the required MMP. Schmitt Dairy has over 800 animal units and if the manure is not contained or applied properly it could cause environmental harm. Additionally, Schmitt Dairy has been applying manure for over ten years without being properly certified. The certification program is an important component of the regulatory laws relating to animal feeding operation, and failure to comply threatens the integrity of this program. Additionally, Schmitt Dairy applied liquid manure to snow covered ground and the potential for environmental harm existed through this practice. DNR Field Office 1 expended a large amount of staff time in investigating the facility and reviewing its records. Based on the above considerations, \$2,500.00 is assessed for this factor.

Culpability - All animal feeding operation owners and operators have a duty to remain knowledgeable of the DNR's requirements and to be alert to the probability that the operation is subject to DNR's rules. The animal feeding operations area of agriculture is a rapidly growing and changing area of agriculture. Animal feeding operation owners and operators have an obligation to be aware of the regulations that apply to the operation of the facility. Additionally, the MMP requirements have been in place since 1999 and Schmitt Dairy continued to operate out of compliance until March 2010. When DNR Field Office 1 conducted its inspection, Mr. Schmitt stated that he knew he was over the MMP limit. Based on the above considerations, \$3,000.00 is assessed for this factor.

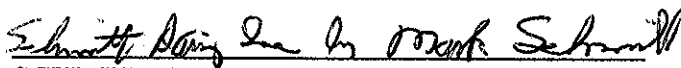
## **VII. WAIVER OF APPEAL RIGHTS**

This administrative consent order is entered into knowingly by and with the consent of Schmitt Dairy. For that reason, Schmitt Dairy waives the right to appeal this administrative consent order or any part thereof.


IOWA DEPARTMENT OF NATURAL RESOURCES  
ADMINISTRATIVE CONSENT ORDER  
ISSUED TO: SCHMITT DAIRY, INC.

**VIII. NONCOMPLIANCE**

Compliance with Section V of this administrative consent order constitutes full satisfaction of all requirements pertaining to the violations described in this administrative consent order. Failure to comply with this administrative consent order may result in the imposition of administrative penalties pursuant to an administrative order or referral to the Attorney General to obtain injunctive relief and civil penalties pursuant to Iowa Code section 455B.191.

  
SCHMITT DAIRY, INC.

Dated this 27 day of  
May, 2010.

  
RICHARD A. LEOPOLD, DIRECTOR  
Iowa Department of Natural Resources

Dated this 3 day of  
June, 2010.

Field Office 1; Kelli Book; Gene Tinker; EPA; VIII.C.1; VIII.D.4; VIII.D